

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

XINUOS, INC.,

Plaintiff,

-against-

INTERNATIONAL BUSINESS MACHINES  
CORP. and RED HAT, INC.,

Defendants.

Case No. 7:22-cv-09777-CS

**DECLARATION OF EMMA KOLESAR IN SUPPORT OF DEFENDANTS' MOTION  
FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S COPYRIGHT CLAIM**

I, Emma Kolesar, declare as follows:

1. I am an attorney at the law firm of Cravath, Swaine & Moore LLP, counsel for Defendants International Business Machines Corporation ("IBM") and Red Hat, Inc. ("Red Hat") in the above-captioned matter. My office is located at Worldwide Plaza, 825 Eighth Avenue, New York, NY 10019.

2. I submit this declaration in support of Defendants' Motion for Partial Summary Judgment on Plaintiff's Copyright Claim.

3. Attached hereto as **Exhibit 1** is a true and correct copy of an excerpt of the Declaration of Richard Alexander Bolandz, filed in *In re The SCO Group, Inc.*, Case No. 07-11337-BLS (Bankr. D. Del.) ("*In re SCO*"), dated February 14, 2011.

4. Attached hereto as **Exhibit 2** is a true and correct copy of the Notice of Filing of Executed Purchase Agreement and Proposed Sale Order in Connection Therewith, filed in *In re SCO*, dated January 24, 2011.

5. Attached hereto as **Exhibit 3** is a true and correct copy of the Asset Purchase Agreement by and between The SCO Group, Inc. and SCO Operations, Inc., and Unxis, Inc., dated January 19, 2011.

6. Attached hereto as **Exhibit 4** is a true and correct copy of the Joint Development Agreement between The Santa Cruz Operation, Inc. and International Business Machines Corporation, dated October 23, 1998.

7. Attached hereto as **Exhibit 5** is a true and correct copy of an excerpt of SCO's Statement of Reconciled and Disputed Facts as to IBM's Motion for Summary Judgment on SCO's Unfair Competition Claim, filed in *SCO Grp., et al. v. Intl Bus Mach Inc.*, Case No. 2:03-cv-00294 (D. Utah) ("*SCO v. IBM*"), dated July 20, 2015.

8. Attached hereto as **Exhibit 6** is a true and correct copy of a document titled "genus: An IBM/SCO UNIX Project Marketing Development Plan".

9. Attached hereto as **Exhibit 7** is a true and correct copy of an article titled "Itanium: A Cautionary Tale", dated December 8, 2005, available at <https://www.zdnet.com/article/itanium-a-cautionary-tale/>.

10. Attached hereto as **Exhibit 8** is a true and correct copy of an excerpt of the Declaration of David McCrabb, filed in *SCO v. IBM*, dated September 18, 2006.

11. Attached hereto as **Exhibit 9** is a true and correct copy of an excerpt of the public version of SCO's Memorandum in Opposition to IBM's Motion for Summary Judgment on SCO's Unfair Competition Claim, filed in *SCO v. IBM*, dated November 11, 2006, and filed publicly on December 28, 2006.

12. Attached hereto as **Exhibit 10** is a true and correct copy of an excerpt of the webpage for AIX 5L, dated May 2, 2001.

13. Attached hereto as **Exhibit 11** is a true and correct copy of an excerpt of the Order Granting IBM's Motion for Partial Summary Judgment, issued in *SCO v. IBM*, dated February 5, 2016.

14. Attached hereto as **Exhibit 12** is a true and correct copy of an article titled "Is Merced doomed?", last modified January 2, 2002, available at <https://www.cnet.com/tech/tech-industry/is-merced-doomed/>.

15. Attached hereto as **Exhibit 13** is a true and correct copy of an article titled "Caldera Systems to Acquire SCO Server Software and Professional Services Divisions, Providing World's Largest Linux/UNIX Channel", dated August 2, 2000, available at <https://pressreleases.responsesource.com/news/8401/caldera-systems-to-acquire-sco-server-software-and-professional-services/>.

16. Attached hereto as **Exhibit 14** is a true and correct copy of a letter from Ronald A. Lauderdale to Kimberlee A. Madsen, dated June 19, 2001.

17. Attached hereto as **Exhibit 15** is a true and correct copy of the Original Complaint filed in *SCO v. IBM*, dated March 6, 2003.

18. Attached hereto as **Exhibit 16** is a true and correct copy of the Second Amended Complaint filed in *SCO v. IBM*, dated February 27, 2004.

19. Attached hereto as **Exhibit 17** is a true and correct copy of an article titled "SCO changes name to Tarantella", dated August 20, 2000, available at <https://www.zdnet.com/article/sco-changes-name-to-tarantella/>.

20. Attached hereto as **Exhibit 18** is a true and correct copy of an excerpt of the docket of *SCO v. IBM*, dated January 27, 2023.

21. Attached hereto as **Exhibit 19** is a true and correct copy of an excerpt of the public version of the Proposed Third Amended Complaint filed in *SCO v. IBM*, dated October 14, 2004, and filed publicly on July 6, 2005.

22. Attached hereto as **Exhibit 20** is a true and correct copy of an excerpt of the public version of IBM's Memorandum in Support of Its Motion for Summary Judgment on SCO's Unfair Competition Claim, filed in *SCO v. IBM*, dated September 27, 2006, and filed publicly on September 29, 2006.

23. Attached hereto as **Exhibit 21** is a true and correct copy of the Joint Status Report filed in *SCO v. IBM*, dated March 13, 2015.

24. Attached hereto as **Exhibit 22** is a true and correct copy of an excerpt of the Memorandum Decision and Order on Motions for Summary Judgment issued in *SCO Grp. v. Novell Inc.*, Case No. 2:04-cv-00139 (D. Utah), dated August 10, 2007.

25. Attached hereto as **Exhibit 23** is a true and correct copy of the Notice of Filing for Bankruptcy filed in *SCO v. IBM*, dated September 14, 2007.

26. Attached hereto as **Exhibit 24** is a true and correct copy of the Order Approving the Sale of Substantially All of the Debtors' Software Product Business Assets, issued in *In re SCO*, dated March 7, 2011.

27. Attached hereto as **Exhibit 25** is a true and correct copy of an article titled "SCO is dead, SCO Unix lives on", dated April 14, 2011, available at <https://www.zdnet.com/article/sco-is-dead-sco-unix-lives-on/>.

28. Attached hereto as **Exhibit 26** is a true and correct copy of the docket of *SCO Grp., et al. v. Intl Bus Mach Inc.*, Case No. 16-4040 (10th Cir.) ("*SCO v. IBM* Appeal"), dated January 27, 2023.

29. Attached hereto as **Exhibit 27** is a true and correct copy of an excerpt of the public version of The SCO Group, Inc.'s Memorandum in Support of Its Motion to Reopen the Case, filed in *SCO v. IBM*, dated November 4, 2011, and filed publicly on November 4, 2011.

30. Attached hereto as **Exhibit 28** is a true and correct copy of an excerpt of The SCO Group, Inc.'s Reply Memorandum in Support of Its Motion to Reopen the Case, filed in *SCO v. IBM*, dated December 8, 2011.

31. Attached hereto as **Exhibit 29** is a true and correct copy of the Partial Judgment Dismissing SCO Claims issued in *SCO v. IBM*, dated July 10, 2013.

32. Attached hereto as **Exhibit 30** is a true and correct copy of an excerpt of SCO's Memorandum in Response to IBM's Motion for Partial Summary Judgment on the Basis of the *Novell* Judgment, filed in *SCO v. IBM*, dated August 29, 2013.

33. Attached hereto as **Exhibit 31** is a true and correct copy of the Memorandum Decision and Order Granting in Part and Denying in Part IBM's Motion for Partial Summary Judgment on the Basis of the *Novell* Judgment, issued in *SCO v. IBM*, dated December 15, 2014.

34. Attached hereto as **Exhibit 32** is a true and correct copy of an excerpt of the Order Granting IBM's Motion for Partial Summary Judgment issued in *SCO v. IBM*, dated February 8, 2016.

35. Attached hereto as **Exhibit 33** is a true and correct copy of the Joint Motion for Certification Under Fed. R. Civ. P. 54(b), filed in *SCO v. IBM*, dated February 26, 2016.

36. Attached hereto as **Exhibit 34** is a true and correct copy of an excerpt of the Reply Brief of Plaintiff Counterclaim Defendant-Appellant, filed in the *SCO v. IBM* Appeal, dated November 21, 2016.

37. Attached hereto as **Exhibit 35** is a true and correct copy of an excerpt of the Response of The SCO Group, Inc. to Petition for Rehearing and Rehearing En Banc of Defendant-Appellee, IBM, filed in the *SCO v. IBM* Appeal, dated December 1, 2017.

38. Attached hereto as **Exhibit 36** is a true and correct copy of the Joint Status Report filed in *SCO v. IBM*, dated February 16, 2018.

39. Attached hereto as **Exhibit 37** is a true and correct copy of the Status Report of the Chapter 7 Trustee, filed in *In re SCO*, dated September 14, 2018.

40. Attached hereto as **Exhibit 38** is a true and correct copy of the Status Report of the Chapter 7 Trustee, filed in *In re SCO*, dated April 29, 2019.

41. Attached hereto as **Exhibit 39** is a true and correct copy of an article titled “IBM’s Objections and Corrections to SCO’s ‘Proposed Partial Judgment’”, dated June 28, 2013, available at <http://www.groklaw.net/articlebasic.php?story=20130628201330262>.

42. Attached hereto as **Exhibit 40** is a true and correct copy of an article titled “The Love of Linux: 14. So What About the SCO Lawsuit?”, dated January 16, 2016, available at <https://www.linkedin.com/pulse/love-linux-14-so-what-sco-lawsuit-ransom-love/?trk=hp-feed-article-title-publish>.

43. Attached hereto as **Exhibit 41** is a true and correct copy of a webpage titled “SCO v IBM et al – Project Monterey”, dated 2016, available at <https://www.tech-insider.org/sco-v-ibm-et-al/project-monterey.html>.

44. Attached hereto as **Exhibit 42** is a true and correct copy of an article titled “Appeals court keeps alive the never-ending Linux case, *SCO v. IBM*”, dated October 30, 2017, available at <https://arstechnica.com/tech-policy/2017/10/appeals-court-keeps-alive-the-never-ending-linux-case-sco-v-ibm/>.

45. Attached hereto as **Exhibit 43** is a true and correct copy of an article titled “SCO versus IBM (and Linux) springs back to life after court ruling”, dated November 2, 2017, available at <https://www.computing.co.uk/news/3020308/sco-versus-ibm-and-linux-springs-back-to-life-after-court-ruling>.

46. Attached hereto as **Exhibit 44** is a true and correct copy of an excerpt of the public version of the Reply Memorandum in Further Support of SCO's Motion for Leave to File a Third Amended Complaint Pursuant to Federal Rules of Civil Procedure 15(a) and 16(b), filed in *SCO v. IBM*, dated December 29, 2004, and filed publicly on August 4, 2005.

47. Attached hereto as **Exhibit 45** is a true and correct copy of the Order Approving the Settlement and Release Agreement between the Trustee and IBM, issued in *In re SCO*, dated October 14, 2021.

48. Attached hereto as **Exhibit 46** is a true and correct copy of the Objection of Xinuos Inc., to the Motion of Chapter 7 Trustee for Entry of an Order Approving the Settlement and Release Agreement by and between the Trustee and IBM Corporation, filed in *In re SCO*, dated September 9, 2021.

49. Attached hereto as **Exhibit 47** is a true and correct copy of the Omnibus Reply in Support of Motion of the Chapter 7 Trustee Pursuant to Fed. R. Bankr. P. 9019 for Entry of an Order Approving the Settlement and Release Agreement, filed in *In re SCO*, dated September 19, 2021.

50. Attached hereto as **Exhibit 48** is a true and correct copy of IBM's Joinder and Reply in Support of the Motion of the Chapter 7 Trustee for Entry of an Order Approving the Settlement and Release Agreement, filed in *In re SCO*, dated September 19, 2021.

51. Attached hereto as **Exhibit 49** is a true and correct copy of an excerpt of the Certification of Counsel Regarding Proposed Order Approving the Settlement and Release Agreement by and between the Trustee and IBM, and Xinuos's Revised Proposed Order, filed in *In re SCO*, dated September 28, 2021.

52. Attached hereto as **Exhibit 50** is a true and correct copy of the Order Granting Stipulated Dismissal of All Claims with Prejudice, issued in *SCO v. IBM*, dated November 5, 2021.

53. Attached hereto as **Exhibit 51** is a true and correct copy of Xinuos, Inc.'s First Set of Requests for Production to Defendants, served in the above-captioned case on December 21, 2022.

54. Attached hereto as **Exhibit 52** is a true and correct copy of Xinuos, Inc.'s First Set of Requests for Inspection to Defendants, served in the above-captioned case on December 21, 2022.

55. Attached hereto as **Exhibit 53** is a true and correct copy of Xinuos, Inc.'s First Interrogatories to IBM, served in the above-captioned case on December 23, 2022.

56. Attached hereto as **Exhibit 54** is a true and correct copy of the Initial Disclosures of Xinuos, Inc.'s Pursuant to Fed. R. Civ. P. 26(a)(1), served in the above-captioned case on January 10, 2022.

Executed on January 27, 2023

/s/ Emma Kolesar

Emma Kolesar